



UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW

The Year in Copyright - 2018

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New federal legislation

- Music Modernization Act
- CLASSICS Act
- Allocation for Music Producers Act



Music Modernization Act

- New **mechanical licensing collective** to collect songwriting royalties from streaming services
- New Copyright Royalty Judge rate-setting standard (**market rate** rather than policy-oriented)
- **Blanket license** for digital phonorecord deliveries
- Two-year phase-in



Music Modernization Act

What's new?

- New mechanism for songwriters to get royalties!
- Interactive music services don't need individual publishing licenses (if they follow the rules)
- Burden now on rightsholder, not streaming service, to know about MLC and register with it.
- “Orphan works” solution: MLC will distribute unclaimed accrued royalties to other entities based on market share
- Limitation on statutory damages for unlicensed uses prior to 1/1/18



Music Modernization Act

What HASN'T changed?

- MLC does not handle synchronization licenses, public performance licenses, lyric licenses, hybrid licenses, sampling, etc.
- Music services can still get direct license
(but must share info with MLC so it can properly distribute unclaimed royalties, and in some cases pay an administrative fee to MLC)



Music Modernization Act

What remains to be seen?

- **How MLC will get all the information** as to what has been streamed and which songwriters own what
- How MLC will **protect proprietary information** about direct licenses
- Who will serve on the **MLC board** (10 music publishers, 4 songwriters who kept their publishing, 3 nonvoting members)
- DOJ review of ASCAP, BMI consent decrees



CLASSICS Act

- New federal copyright protection for **digital audio transmission public performances** of pre-February 15, 1972 sound recordings
- **New expiration dates** for pre-2/15/72 sound recordings

Recordings first published **before 1923** are now protected up to **December 31, 2021**

Recordings created between **1923-1946** are now protected an **additional 5 years** after their general 95-year copyright term

Recordings created between **1947-1956** are now protected an **additional 15 years** after their general 95-year copyright term and

Recordings created between **1957-2/15/1972** are now protected an until **February 15, 2067**



Allocation for Music Producers Act

SoundExchange to receive “**letters of direction**” from recording artists who want to distribute a portion to a producer

For pre-11/1995 works,
Soundexchange to **reserve 2% to producers** owed a portion of royalties

Authorship: No Copyright in “Monkey Selfie”

Naruto v. Slater, 9th Cir.

- A crested macaque took a selfie
- Animals don’t have statutory standing to sue under the Copyright Act
- Judge Orricks’ dismissal affirmed





Authorship: CGI company does not have authorship over images made with motion-capture CGI

Rearden LLC v. Walt Disney Co. (N.D. Cal.)


- Copyright protection might extend to the program's output if program does "lion's share" of the creative work
- Here, however, human contribution was substantial, not marginal.



Originality: Remaster not independently copyrightable

ABS Ent'mt, Inc. v. CBS Corp. (9th Cir.)

- CBS was using remastered pre-1972 sound recordings
- Remastered sound recording not eligible for independent copyright protection as a derivative work unless its “essential character and identity reflect a level of independent sound recording authorship that makes it a variation distinguishable from the underlying work”



Originality: Copyright in database design choices, but no infringement where some data taken

Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc. (9th Cir.)

- Experian showed “at least minimal creativity” in making choices about what to include in database
- But where data copied but not whole database, no infringement



Display right: Embedded tweet violates display right

Goldman v. Breitbart News Network (S.D.N.Y.)

- News sites embedded tweet containing photo of Tom Brady and Danny Ainge (originally from Snapchat)
- Court held that embedding tweet violated display right
- Rejected “server test”
- Declined to follow *Perfect 10 v. Amazon* (9th Cir 2007)



Moral rights: Egyptian moral rights can't be enforced here

Fahmy v. Jay-Z (9th Cir.)

- 1999's "Big Pimpin'" vs 1957 arrangement by Egyptian composer Baligh Hamdy of "Khosara"
- Infringement claim cannot be based solely on Egypt's inalienable "moral right" of author to object to offensive uses of a work.
- Jay-Z had already paid \$100,000 to EMI Music Arabia for publishing & distribution



Moral rights: California Resale Royalties Act preempted; conflicts with first sale doctrine

Close v. Sotheby's (9th Cir.)

- Class action against Sotheby's, Christie's, and eBay
- CRRA grants artists 5% of proceeds to any resale of artwork
- No *droit de suite* in United States law
- Claims between 1/1/77 and 1/1/78 are not preempted because 1909 Act does not expressly preempt




First Sale: Resale of digital files not protected by first sale doctrine

Capitol Records, LLC v. ReDigi Inc. (2d Cir.)

- First sale doctrine did not protect website operator's distribution of record company's copyrighted works
- No fair use



Other interesting cases

- *BMG v. Cox Communications* (4th Cir.): Cox not eligible for §512 safe harbor, \$25 million jury verdict affirmed
 - *Spanski Enters. v. Telewizja Polska, S.A.* (D.C. Cir.): infringing performance that originated abroad but that ultimately reached viewers in United States could be actionable under Copyright Act
 - *Cobbler Nev., LLC v. Gonzales* (9th Cir.): bare allegation that defendant is registered subscriber of an IP address is insufficient to prove infringement
- 



Are state laws and technical codes copyrightable?

- *Code Revision Comm'n v. Public.Resource.Org, Inc.* (11th Cir.): Georgia Annotated Code a sovereign work, not copyrightable
- *Am. Soc'y for Testing & Materials v. Pub. Resource.Org, Inc.* (D.C. Cir.): Remanded to determine whether fair use to reproduce technical standards later incorporated by reference into law



SCOTUS WATCH!

Rimini Street Inc. v. Oracle USA

- Whether “full costs” awarded to a prevailing party in a copyright claim are limited to taxable costs, or alternatively whether non-taxable costs are also authorized.
- Oral argument January 14

Fourth Estate Public Benefit Corp. v. Wall-Street.com

- When registration of a copyright claim has been made under 17 U.S.C. §411(a)
- Oral argument was on January 8



International Developments

- **EU Copyright Reform** ongoing
- **United States-Mexico-Canada Draft Agreement** signed 11/30/18; virtually identical to CFTPP
- **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)** entered into force on 12/30/18 in Canada, Australia, Japan, Mexico, New Zealand, and Singapore
- WIPO looking at **treaty on protection of traditional knowledge, folklore**
- Copyright reform in **South Africa, Australia**



United States Mexico Canada Agreement (USMCA)

- **Draft agreement** signed 11/30/18; WH must now present to Congress, conduct impact assessments, and more
- TPP's "Balance" provision not included
- No requirement for Canada to adopt notice-and-takedown regime for internet service providers
- No major changes to US Law



Infringement: *Gaye v. Williams*

- “Got to Give It Up” vs. “Blurred Lines”
- Jury held songs were substantially similar
- On appeal, Williams & Thicke argued that the trial court allowed expert testimony relating to unprotectable elements, other error
- Ninth Circuit disagreed. AFFIRMED.
- Dissent noted that songs have different lyrics, melodies, harmonies, and rhythms, and that the expert “cherry-picked brief snippets.”



Infringement: *Skidmore/Wolfe v. Led Zeppelin*

- “Taurus” vs “Stairway to Heaven”
- Jury returned verdict for Led Zep: access, but no extrinsic similarity
- Lower court failed to instruct re protectability of selection & arrangement
- Lower court erred on originality, as short sequences can be copyrightable when combined with other elements
- VACATED & REMANDED



Infringement: *Griffin v. Sheeran*

- Dispute over infringement of Gaye's "Let's Get It On."
- SDNY (J. Stanton) found that there was "substantial similarities between several of the two works' musical elements."
- The judge also stated that ordinary listeners might view the songs' "aesthetic appeal" as the same, despite different vibes of the songs.



Infringement: *Rentmeester v. Nike, Inc.*

- Rentmeester sued Nike for turning his photo of Michael Jordan into iconic trademark
- Court: Similarities in pose, setting, and camera angle not enough to constitute substantial similarity
- Photos and music are different



Infringement: *Hall v. Swift* (C.D. Cal.)

- “Playas Gon’ Play” vs “Shake It Off.”
- Short phrase “Playas, they gonna play/And haters, they gonna hate” is not sufficiently creative to warrant protection
- “[A]s Plaintiffs acknowledge, by 2001, American popular culture was heavily steeped in the concepts of players, haters, and player haters.”



Fair Use Roundup

Oracle Am., Inc. v. Google LLC (Fed Cir.)

- Google copied Oracle's APIs
- **Federal Circuit overruled jury verdict finding fair use**
- "All jury findings relating to fair use other than its implied findings of historical fact must, under governing Supreme Court and Ninth Circuit case law, be viewed as advisory only."



Fair Use Roundup

Fox News Network, LLC v. TVEyes, Inc. (2d Cir.)

- Media-monitoring service aggregated news reports into searchable database
- **MSJ grant affirmed: no fair use**



Fair Use Roundup

Lombardo v. Dr. Seuss Enterprises **(2d Cir.) (unpublished)**

- Affirmed district court's declaratory judgement of fair use
- Play is a parody, "imitating the style of the *Grinch* for comedic effect and to mock the naïve, happy world of the Whos"



Fair Use Roundup

Brammer v. Violent Hues **(E.D. Va)**

- North Virginia Film Festival used photo on website, took down upon notice
- MSJ for fair use **GRANTED**
- Use was noncommercial, and transformative: “promotional and expressive” vs “informative”



Fair Use Roundup

Cambridge Univ. Press v. Albert (11th Cir.)

- Epic e-reserves test involving Georgia State U.
- No mathematical formula for fair use



Fair Use Roundup

Hirsch v. Complex (SDNY)

- Hirsh licensed photo to NY Post
- Complex made 1:44 video about story, used 4 seconds of the paper incl. photo
- **Court: Defendant's MSJ on fair use DENIED**



Fair Use Roundup

Philpot v. Alternet Media, Inc. (N.D. Cal.)

- User posted CC-licensed photo
- Alternet added text, did not credit
- **Court DENIES Defendant's MtD on fair use**
- Grants MtD on RMI



Fair Use Roundup

Otto v. Hearst Comms., Inc. **(SDNY)**

- Deutsche Bank Pres posted pic to Instagram
- Esquire used pic in article
- **Court: NOT fair use, MSJ GRANTED for plaintiff**



Fair Use Roundup

Estate of James Oscar Smith v Aubrey Drake Graham (SDNY)

- MSJ granted in 2017 on fair use of Drake poem sample
- Appeal filed January 2, 2019 in Second Circuit



Fair Use Roundup

Graham v. Prince (SDNY)

- Complaint filed Dec. 2015
- **Motion to Dismiss on fair use denied July 2017**
- MSJ filed Oct 5, 2018



Fair Use Roundup

McNatt v. Prince (SDNY)

- Complaint filed Nov. 2016
- MSJ filed October 2018



WORKS FROM 1923 ENTER THE PUBLIC DOMAIN!

As of January 1, 2019



STORIES TO WATCH

Copyright reform in EU

- Parliament voted 11/13
- Parliament, Commission & Council now must agree
- More negotiations Jan. 14
- EU Parliament elections in May



More information

- Music Modernization Act of 2018 Final Language
<https://www.congress.gov/bill/115th-congress/house-bill/1551/text#toc-H9F730B8EE93C4ABEB090DE368F858B7F>
- Amended Title 17 sections:
https://www.copyright.gov/legislation/2018_mma_amendments.pdf
- Tyler Ochoa CLA webinar on Music Modernization Act, Jan. 24
<https://calawyers.org/IP#jan24>
- “An Insanely Detailed Discussion About the Music Modernization Act,” Digital Music News (Oct. 17, 2018)
<https://www.digitalmusicnews.com/2018/10/17/music-modernization-act-details/>



More information

- *Negotiations on EU copyright reform to rumble into 2019*, World Intellectual Property Review (Dec. 18, 2018), https://www.worldipreview.com/news/negotiations-on-eu-copyright-reform-to-rumble-into-2019-17163?success_subscription=1.
- US-Mexico-Canada Act
[https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20 Intellectual Property Rights.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20%20Intellectual%20Property%20Rights.pdf)